IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ,	)	
Plaintiff,	)	
vs.	)	Circuit Court
	)	Case No. 0002-01376
PHILIP MORRIS INCORPORATED, a foreign corporation, and ROTHS I.G.A. FOODLINER, INCORPORATED, an Oregon CORPORATION,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
Volume 21-C

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Roosevelt Robinson, Judge of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 3:00 p.m., Tuesday, February 6, 2002.

APPEARANCES:

Mr. D. Lawrence Wobbrock, Attorney at Law
Mr. Charles S. Tauman, Attorney at Law
Mr. Richard A. Lane, Attorney at Law,
Appearing on behalf of the Plaintiff;

Mr. James L. Dumas, Attorney at Law,
Mr. John W. Phillips, Attorney at Law,
Appearing on behalf of the Defendant
Philip Morris, Incorporated and Defendant
Roths I.G.A. Foodliner, Incorporated;

ALSO PRESENT:
Mr. Herbert Pallant

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THE COURT: All right. Counsel, I have received a proposed curative instruction to give to the jury. It's my understanding there is one statement in that curative instruction that the defense is objecting to. Would you like to be heard on that just briefly, please?
MR. TAUMAN: I don't need to be heard on that, Your Honor. Other than when you give a curative instruction, you don't need to say the other lawyer was wrong in doing what he did. You just tell them to disregard it.
MR. WOBBROCK: Your Honor, it's always difficult to ask for a curative instruction because you are afraid to emphasize the issue, but I think that's the only fair way to do it, other than emphasizing the supposed non-care.
THE COURT: All right, counsel. The Court will give the curative instruction. And the Court will take out the statement that we talked about in that when the Court gives the jury a curative instruction, the Court does not have to explain to the jury all the reasoning behind why it's giving the instruction to disregard. The main thing is I want them to disregard that statement. As long as they do

that, I'm happy with them.
All right. Please bring the jury.
MR. PHILLIPS: May I stay here, Your Honor?
THE COURT: Wherever you like to be comfortable, counsel.
MR. WOBBROCK: You will give that instruction before Mr. Phillips starts?
THE COURT: I'll give that instruction before he starts his presentation.
(Jury in.)
THE COURT: All right. Members of the jury, the Court has a curative instruction to give to you. What happens when a mistake has been made, if it's brought to the Court's attention, the Court does not wait until the end of the trial to try to deal with it. The Court try to deal with it immediately so he can take care of the problem.
So here's my curative instruction: During defendant's opening statement, a comment was made regarding Michelle Schwarz' treatment for an alcohol problem. You must disregard that statement. If you have it in your notes, scratch it out, no further mention, no further

discussion. And it's not important whether or not the comment was accurate. It is not an issue in this case. So it's stricken completely from the record. Got me? Thank you.
Counsel, you may proceed with your

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opening, please.

MR. PHILLIPS: Thank you very much, Your Honor.

May it please the Court, counsel, ladies and gentlemen of the jury, I'm John Phillips. I remind you again I'm with James Dumas representing Philip Morris in this case. We are now in the last leg of the afternoon, and I appreciated, as I watched you today, how much you paid attention to other counsel, and I simply ask you to try to hang in there for the last hour and a half or so for my presentation.

I wants to focus by starting on the product at issue in this case, because there has been a lot of advertisements for other products, discussions of other products and other people.

This case is about Michelle Schwarz and Merit Cigarettes. Merits were put on the

market in 1976. And just as you have to look back in time when you think of what information was available in the 1950's or 1964, when Michelle started to smoke, you also have to put yourself -- and there will be more of you who can, because that's not quite so distant in the past. That's a quarter of a century ago -- what it was like in 1976. And there were differences then as well. When you think about it, in 1976, you had an evening news channel. You usually had three stations: CBS, ABC, NBC. You didn't have CNN rolling all day long where you could pick up the news any time you wanted to. And families, for that matter, when you think about it, tended to congregate more in the evening for dinner and for the evening news than is the case today.

There are lots of reasons that go into that. But the reality is that the evening news was an extremely important part of the information in the American families in 1976, probably a lot more than it is today, given all the other resources, including the Internet, for getting news information.

I want to show you a news clipping from

1976. This is the time when Michelle Schwarz switched to Merit Cigarettes.

(Tape played.)

I hope I didn't cut that off too quickly. Uhm, ladies and gentlemen, you will need to ask yourself in this case why public health officials and the government were telling smokers like Michelle Schwarz what you just heard in 1976. And I submit that the answer to that question at the conclusion of this evidence will go a long way to answering that third question that you will be asked to answer in this case. Who is responsible for Michelle Schwarz's decision to smoke Merit Cigarettes?

And just to be clear, I didn't have to

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search very far for this kind of message, because this kind of message permeated the public health message to consumers for 35 years.

Let me show you one more. It's shorter, but it's fun to show it because you will recognize the newscaster, and he looks like he's a junior in high school.

(Tape played.)

All right. Ladies and gentlemen, that

message was given to smokers during the entire period that Michelle Schwarz smoked Merit Cigarettes. It wasn't given to Michelle by Philip Morris. Frankly, was given to Michelle by a far more credible source, public health authorities and the government. And what they told her and they told other smokers repeatedly over and over again was quit. The only way to reduce risk really is to quit. But if you don't quit, go to a lower or reduced tar and nicotine cigarette. Because, as the reports indicated, they are less hazardous.

So let's again rewind the tape a little bit and look at how it was that Philip Morris, as a cigarette maker, came to make low-tar cigarettes, the Merit Cigarettes, which are the product at issue in this case. I cannot emphasize that more. Merits are the product of this case, not Trues, not Camels. Merits, that's what she smoked. That is what's at issue in this case.

Well, in the 1950s, because you have now heard about the mouse skin painting studies and the epidemiological studies, the studies of human populations that showed a link or

association between smoking and lung cancer. The public health community recommended that tar be lowered, because tar, which is what was being painted on the backs of mice, was thought to be the source for lung cancer.

In 1964, the Surgeon General's -- we talked -- Mr. Dumas talked about the Surgeon General's report. The drumbeat got quite loud, because, as Mr. Dumas said, there was really two prongs to the public health recommendations in 1964. I talked about the first prong, which was to get the message out, to warn people. Congress put warnings on the packaging, and the public health community undertook an extraordinarily successful campaign that got millions and millions of people to quit.

What was the second prong? The second prong was to encourage tobacco manufacturers, cigarette manufacturers like Philip Morris, to make reduced tar and nicotine cigarettes. And since 1964, ladies and gentlemen, the public health community has thought and has recommended in the kind of news clips I have just shown you that lowering tar levels would

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make the cigarettes safer.

All right. Now, it's one thing to lower the tar. It's another thing to measure it. Excuse me. I think I'm all right.

This is a 1967 American Cancer Society bulletin. It says just what I told you before: If you do smoke cigarettes, you should know the relative amounts of nicotine and tar in your cigarettes. As determined by the Federal Trade Commission, the government, the less tar and nicotine you inhale, the better.

The sheet there is an Exhibit that you will see in trial. It actually has the tar and nicotine numbers for all the brands that were tested that year by the Federal Trade Commission.

And the reason, of course, that the Federal Trade Commission adopted this was it wanted to have a standardized method by which consumers would compare one brand to the next.

But there is a little history here regarding FTC, Federal Trade Commission, and its regulation of cigarette advertising that you need to understand how we got to that point.

This is a -- excuse me. Excuse me. Why

is it always me who has the technological problems? There is a pattern here.

Let me walk this through with you, ladies and gentlemen. The Federal Trade Commission, which is a federal agency, regulates advertising of cigarettes. One of the things it regulates is tar and nicotine rates.

Now in 1955 -- again, this goes back a long time, and before that there had been some advertising by tobacco companies, doctors appearing in advertisements saying, "This cigarette is less harsh on my throat" and so forth. The Federal Trade Commission stepped in and said, you are not -- you, tobacco companies, are not to make any health claims in your advertising.

And what they meant by that was you can't say, "My cigarette is healthier or less hazardous than another cigarette" unless you can substantiate it scientifically. And in 1955 I don't think anyone actually knew what that meant.

But the effect of that for the last 45 or so years has been that cigarette companies are not permitted, absolutely are prohibited from

making any health claim. And Philip Morris has never been prosecuted for ever -- since 1955 and certainly never with Merit Cigarettes -- for ever making a health claim with respect to cigarettes: These cigarettes are safer or less hazardous than others.

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1959 -- well, remember I mentioned that the public health community in the 50's said, "We want you to try to reduce tar and nicotine. We have seen the tar effects on the backs of mice. Lower tar, see what we can get."

Well, tobacco companies began lowering the tar usually through the filters, in the first instance, in their cigarettes. But one tobacco company had one way of measuring it and another tobacco had another way of measuring it, and each probably in a fairly advantageous and self-interested way.

The FTC stepped in in 1959 and said, "Stop saying anything about tar in your advertisements." This is really important, this progression. It's detailed, but it's so important for you to understand what the history of regulation has been and how tobacco companies have been guided and Philip Morris

has been guided by that regulation in their reasonable conduct.

1960, FTC bans tar and nicotine advertising after halting what was called at the time the "tar derby" in terms of advertising.

But then we had the Surgeon General's report. We talked about that. The Surgeon General said, "We really do want you to lower tar and nicotine, and we want consumers to know about it." So in 1966, the FTC revised its guides. It says you can advertise tar and nicotine, but they wanted to standardize it. They didn't want people using their own measures for tar and nicotine.

So in 1967, the FTC adopted what's called the FTC Cambridge Filter Methods Test. It's a machine test. It doesn't tell you how you are going to smoke, because it smokes on regular intervals a certain amount until it's done. The FTC is the one that adopted it, and we'll hear about what Philip Morris had to say about it at the time. They objected, because it doesn't measure what smokers would get. But that was the method.

Then in 1970, the FTC proposed a rule requiring disclosure of all of the tar and nicotine yields using only its methods. So over a three or four-year period, first they adopted this method for standardization. You saw the American Cancer Society's bulletin showing what the numbers were, and then it proposed a rule saying, "All right. We want you to put it -- we want you tobacco companies to measure only according to this method."

The tobacco companies agree. And so as of 1970, the only way that tar and nicotine can be measured and communicated to consumers -- consumers like Michelle Schwarz -- has been through the FTC tar and nicotine method.

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Now, Mr. Wobbrock said, you know, "They didn't have to say it was low tar." I scratched my head when he said that. I didn't really understand what he meant. The numbers are the numbers. Marlboro, for example, I think -- this is sort of an approximation. Marlboro is a 16mg cigarette. Merit an 8mg cigarette, tar. Merit Ultima, which Michelle Schwarz never smoked, is a 1mg tar cigarette.

In 1971 the FTC told tobacco companies

that they could use phrases like "low tar" and "reduced tar" as long as those adjectives were describing the numbers on their method. And what is low or lower? Its describing -- it's the words you use to describe the difference between 16 and 8 and 8 and 1.

So again, the FTC authorized this as a way of describing it's own measures.

And in 1978, ladies and gentlemen, there was another tobacco company that went to the FTC and said, "Hey, we would actually like to advertise our tar measures higher than the FTC measures." They said, "No, you must use our measures."

So for the last 32 years, the FTC measures are the only measures by which tar and nicotine are advertised to consumers and consumers like Michelle Schwarz.

Now, you are going to hear some testimony that the FTC has periodically been asked to revise that method. In fact, it has been asked to revise that method using precisely the criticisms that Philip Morris gave -- we'll talk about this in a minute -- about why they shouldn't have adopted in the first place

because it doesn't actually smoke like a smoker smokes. Let me defer that point until we talk a little more about what Philip Morris said at the beginning when the FTC required this method.

All right. That's how you measure it. But how do you get there? Because, after all, this is a product liability case. They made a claim there is something defective in the design of this cigarette, and we need to understand what it is that's defective according to the plaintiff, and you will need to evaluate the evidence, whether that is right.

All right. Another thing, you wouldn't imagine this happening today, not in the current environment of the regulators, the states, the federal government's attitude towards tobacco other than to get taxes.

In 1968, the federal government through the National Cancer Institute, which is a federal agency, developed something called the Tobacco Working Group. It was a collaboration between the tobacco industry, including Philip

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Morris representatives, and the federal

government. And the design of this group came right out of the '64 Surgeon General's report. Let's figure out a way to try to make a less hazardous cigarette. So we brought the expertise of the public health community and the government together with tobacco companies, and a number of recommendations were made about how to design a low-tar cigarette. This document, June, 1976, these are just highlights I pulled out for you.

They said you should use high porosity paper so air can filter the paper and dilute the smoke and also gases can escape the cigarette and not be inhaled.

You should use filters and smoke dilution devices. You remember Mr. Wobbrock said Philip Morris had manipulated the design of these cigarettes, ladies and gentlemen, by putting ventilation holes in the filter so that clean air could come into the cigarette when it was drawn upon and dilute the stream. Well, we'll talk about that this afternoon. But what you need to know for now is that the federal government in collaboration with the tobacco industry in 1976 said that's what you should

do, use smoke dilution devices, ventilation holes to dilute the air stream, have less tar in what the smoker inhales.

Again, it's important to understand historical perspective, what people did understand, what the government understood, what they were recommending to Philip Morris.

Flavor additives to ensure consumer acceptability, you heard Mr. Wobbrock talk about additives and all these ingredients, and we don't really know what's going on. We'll have some testimony on that subject. I will talk to you about it in a moment.

But the point here is they were recommending it, because when you reduce tar, you take taste out of a cigarette. And if you take taste out and smokers don't want to smoke the low-tar cigarette, then you may have made something less hazardous, but no one is going to use it. So you need to add flavor into your cigarette by lowering -- after lowering the tar to make it more consumer acceptable. That was the recommendation of the Joint Tobacco Working Group, working with the tobacco industry.

And ladies and gentlemen, the evidence

will be that Philip Morris did these things. In fact, they did them really before the recommendations were really even made. And all of these were incorporated in the Merit Cigarettes that counsel claims are defectively and manipulatively designed. All of them were

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incorporated, and others we'll talk about.

All right. So what was the result of this effort? Counsel says it's a fraud. The reality is it was a tremendous success. Tobacco companies and Philip Morris responded with these design features, which resulted in a 70 percent decrease in the tar and nicotine measures by the FTC methods, the standardized measure, using these devices.

Filtration, very important. What does a filter do? Well, it captures the particles in smoke so they can't be taken into the lung. You can have very high-efficiency filters that are hard to draw air through, and they capture lots of particulates. You can have less efficient filters that catch fewer particulates, but that's a great way of reducing the tar that's delivered, because these tar and nicotine measures, they are not

what's in the cigarette, because that doesn't matter. They are what's inhaled. They are in the smoke.

Tar is actually something that's only created as a result of burning. You can't open up an unsmoked cigarette and find tar. What you find is tobacco. And when it's burned, it creates tar, but tar is the result of a burning, a combustion process. Filters reduce tar.

Reconstituted tobacco and permeable paper, these are also ways in which tar and nicotine were reduced, and ventilation holes -- ventilation holes.

Ladies and gentlemen, I have to say this, because it's so important: Counsel talked about Dr. Farone coming in. Dr. Farone will appear. He's appeared in many, many trials against Philip Morris. He was fired, and you will hear the story behind this firing, because he was passed over for a promotion. You will have to draw your own judgments about his objectivity about Philip Morris.

But what he will say, ladies and gentlemen, he will say, "I was involved in the

design of those ventilation holes. We did a great job. We did super science at Philip Morris. We put them in precisely the right position so that people wouldn't cover them up." I mean, you can't eliminate the possibility of people covering them with their fingers or lips, but you can put them in just the right position. And he will tell you they did.

That's their witness. And ventilation holes were used as an important technique to dilute the air stream.

Expanded tobacco, Mr. Wobbrock mentioned that. It's like popcorn. Now, what is the utility of that in reducing tar and nicotine?

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Well, I've got two motives here -- Philip Morris has two motives. Expanded tobacco actually means you have less tobacco in the rods, so they end up saving some money in the process as well. But the reality is you have less tobacco. It's a lighter cigarette. But put it on a scale, it would be lighter than a normal cigarette. And therefore there is less tobacco to burn; therefore, less tar can be created, less can go into the lung. These were

the techniques that were used.

And as you can see, it went down from 35 milligrams to 11 milligrams in the course of that time.

And remember what Merit is. Because in 1976, Merit came out, and it was nine. That's below this chart, ladies and gentlemen. These are the averages.

What do I mean by that? It means they took all the cigarettes sold during a particular year and tried to average out if they were -- it's a little complicated, but if you averaged it out, you could figure out what the average tar was. Merit was below the average. It's below the average today. You can see that this is an 8mg cigarette today, and that chart goes down to ten. So it's still above ten close to 1996. So Merit was below even the average. And it was way below the average in 1976, when it came out.

Now, as I said, Merit Ultra is a 4mg, and Merit Ultima is a 1mg. Both of those brands, by the way, Michelle Schwarz never smoked.

So again, different time, different perspective, different relationship between the

government and the tobacco industry and Philip Morris.

This is what the public health officials said about the data I just gave you. "I do think the tobacco industry adjusts very well to the demands of the logical reasoning of the scientific community and that we should continue on this path."

What this gentleman was saying -- and it's Dietrich Hoffman, who is a famous tobacco scientist, public health tobacco scientist, who has done great research with respect to trying to reduce smoking. He said this in 1980 as a result of the efforts of Philip Morris and others.

And over the ensuing years -- and there are literally hundreds of documents that will memorialize this, and we'll try to summarize them to you through a regulatory historian at trial.

The public health community agreed with the way that Philip Morris was reducing the tar. In other words, the designs that are being described as negligent and defective,

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they agreed with those methods. They said that

for the past 35 years the science demonstrated that low-tar cigarettes are safer.

You know, I'm going to show you this document in a moment, but Mr. Wobbrock said had they known this 1975 secret study by Philip Morris, they wouldn't have come to that conclusion. Ladies and gentlemen, these conclusions were not based on testing nine cigarette smokers, which that study was. I will talk about that. Those studies were based on studies of human populations, large populations. Those who smoked high tar, those who smoked low tar, the government is saying, hey, they get less disease. Those are the conclusions the government was relying upon in making their conclusions, and it was a drumbeat for 35 years -- every year that Michelle Schwarz smoked Merit Cigarettes, every year.

And they told smokers like Michelle Schwarz to quit, but if they didn't, well, then they should think about switching to a low-tar cigarette.

So where are we? All cigarettes are not safe. All of them are dangerous, as Mr. Dumas made very clear. The best thing to do is quit,

but if you don't, then at least go to this low-tar cigarette.

And the sound quality of this next tape is bad. I will warn you there is some granularity to it. This is one the Public Health Service ran on television in the 1970's. And you will recognize, I think, the narrator.

(Tape played.)

All right. So that's the kind of message that was being conveyed. But Mr. Wobbrock said, hey, smokers compensate. You heard that word. They can draw more air in. They can take a light cigarette, and they can cover the ventilation holes. They can smoke more cigarettes to get more tar and nicotine. And, Philip Morris, you knew that and that's your fraud.

Let's talk about that for a second. First, compensation -- I hate that word, because it conjures different images than what we're talking about here.

But compensation, taking more air in than other kinds of techniques has been studied by the government, by public health officials, by Philip Morris for decades. It was well known.

The question was if smokers compensate, is there still a benefit from low tar? And all those studies that lead the public health officials to conclude that low tar is, in fact, safer, you heard them say that. Philip Morris never said that. You heard the public health

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officials say low tar is safer. Those were based on the reality that some smokers were trying to defeat the techniques of low tar and get more tar and nicotine.

So, in other words, when they looked at the studies of the human populations and they saw that low tar smokers were getting fewer diseases, that took into account compensation. So the government knew about compensation, felt it was not complete -- it did not completely defeat the benefits of low tar and repeatedly said it slightly reduces your risk. It slightly reduced the risk because, in fact, some smokers would, in fact, compensate and increase the amount of tar and nicotine they would get.

There was no secret about this. And the recommendations that the government was making repeatedly were based on knowledge on how

smokers smoked sometimes when they go to a low-tar cigarette.

These conclusions were the conclusions of the public health community for the last 35 years. The public health community concluded that compensation is not complete. It's partial or short term. The evidence was suggestive that while a smoker might switch to a low tar and maybe breathe more deeply for awhile, ultimately, they would adjust down to the level of tar and nicotine in the lower cigarette, and the benefits of low tar and nicotine were there and completely -- were repeatedly told to smokers like Michelle Schwarz. They were still safer in the view of the public health authorities, despite compensation.

Now, Mr. Wobbrock, as I mentioned, also talked about the FTC methods and suggested that somehow is a fraud. But it's not because, one, we are required to do it; and two, you can see what Philip Morris said to the FTC when the FTC adopted or was thinking about adopting this method.

Let me read this to you. It's a lot of

words, but it's important. "The proposed method does not measure the volume of smoke or the p.m" -- that's not Philip Morris; that's particulate matter -- "or nicotine in the volume of smoke that any human being will draw from the smoke smoking any particular cigarette. Each smoking characteristic is leveled or averaged out by the standard method. No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion, and the proposed method does not and cannot measure variations in smoking habits."

That's what Philip Morris said when it was objecting to the methods, because the methods wouldn't actually accurately measure how

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specific smokers smoked, and it would be impossible to do that anyway, because smokers vary so greatly in how they smoke.

The FTC said fine, we understand that, but we want the method to be standardized. And you can see the language in the FTC's press release -- let me go to the second paragraph. "No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion." That's right from the comments that

Philip Morris gave them in 1966. The speed at which one smokes varies, both among smokers and usually also varies with the same individual under different circumstances. Some take long puffs. Some take short puffs. The variation affects the tar and nicotine quantity in the smoke generated. Compensation was absolutely front and center when they adopted this method, but they wanted to adopt it. So why did they? Well, the answer is because they wanted a standardized method.

It's sort of like EPA mileage numbers. If you go and buy a new car, you look at the side window, and EPA regulations say city mileage X miles per hour; highway mileage another, 20 and 35. And that doesn't tell you that when you go and buy that car you are going to get 20 miles per hour -- 20 miles per gallon or 35 miles per gallon, because how you drive the car will be different. You might have a heavy foot. You might have a lead foot. You might race the engine at a red light. That's going to affect how you get your miles.

Is that information therefore useless to the driver? No, because you can still compare

that 20-35 for the Honda with the 7-15 for the Cadillac, and you can make comparisons in terms of how much tar -- in this case gas, gas mileage -- you are going to get from one brand to the next. And that is why the FTC wanted to have this standardized method. And it imposed it, as talked about, on the tobacco industry in 1970.

Now, we mentioned that -- Mr. Wobbrock showed you an awful lot of documents over an awful lot of time. And I want to start by saying I'm not going to be able to address all of them. But it's important to realize that he showed you small pieces of documents. I hope when you get the documents in the jury room, you will read around what he called your attention to. Because in many ways, he's been unfair with the documents he's shown you. And I'm going to show that to you with respect to this issue of compensation.

Let's start with the document he did show you on compensation. This is the study he said was hidden, secret. Well, it was a business record of the company. Obviously, they weren't

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writing these studies and then sending them off

to NBC. But this is the study he says could have turned the public health authorities around with respect to whether low tar was better.

Well, it's a 1957 memo from Barbro Goodman. It's Exhibit 153. What he didn't tell you is that it was based on earlier work, again Barbro Goodman to Mr. Meyer, same person. It's Defendant's Exhibit 883. And she describes what was actually done and lead to that memo that she did a number of months later.

If you can turn, please, to the paragraph under discussion, we'll pull that up for the jury to read.

It says, "From our collection of smoker profiles of twelve R&D employees, research and development employees, smoking Marlboro Lights as their regular brand, we were able to find four smokers who were willing to participate and switch to another brand for two weeks; five smokers who normally smoke Marlboro 85's were then selected to be representative of the range of Marlboro 85 smokers.

I'll stop there for a second. This was a

two-week study with nine people in the Research and Development Program, five people who went up, four who went down. That's it. And you will hear plaintiff's expert say this study doesn't show you anything.

It says -- on the top of the page, this is the study that was later reported by Ms. Goodman. Four of the five smokers increased their volume per puff when they smoked the lower-delivery cigarette. They also decreased their puff count per cigarette. So in terms of total volume per cigarette, only three of the five smokers had larger smoke intake. So there's your secret study. Five smokers -- three of them increased their intake over two weeks. That's it.

You can turn to the next page, too, if you would, the top of the page. And second sentence, "There was also a change in the number of cigarettes these smokers consumed in a day. Two smokers increased, two smokers decreased." What does that tell you?

And then further down, if I can, to the paragraph that begins "the two types." She concluded that more -- second sentence, "More

studies are necessary in order to determine which variables had the highest influence on the smoker."

Why do I show you that? Why do I show that you detail? This is one very small study. It produced the result that she reported, which

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Mr. Wobbrock seized upon, that there appeared to be a complete compensation when a high-tar smoker switched to a low tar, and that study of five smokers, two of whom increased the number of cigarettes, two of which decreased.

By the way, when we're talking about increasing, decreasing the number of cigarettes, let's not forget this is a case about Michelle Schwarz. Michelle Schwarz did not increase the number of cigarettes she smoked when she went to low-tar cigarettes. So when there is an argument in this case that low tar is not as safe because low tar smokers smoke more cigarettes, we will show the evidence that is not true, generally speaking, and that in any event, it's not true as to Michelle Schwarz.

Plaintiff's own allegations in this case say that she smoked a pack a day from 1976

until near her death. That's what they say. Her records actually indicate that she smoked fewer. Her medical records indicate she smoked maybe three-quarters or half a pack a day.

So that's why it's important to look at all the evidence as it comes in. And more importantly perhaps here, this study was so small and so limited, why didn't counsel pick out the overview study of Philip Morris' own studies, which showed what it really concluded?

Could you blow up the summary, please? This is Dr. Ryan, 1976. In September of '76, the very time Michelle Schwarz is switching to Merit Cigarettes, and Mr. Wobbrock is saying Philip Morris has some sort of secret knowledge that low tar doesn't work. Well, let's look what we were saying to ourselves in our secret documents. "We have been examining the effects of delivery change on number of cigarettes smoked per day for several years" -- and they had; there are many, many studies -- "in the hope that we could support an intake quota hypothesis."

Can I stop for a second? Why are we using these words? Why is it so hard for

Mr. Phillips not to use normal English? Intake quota hypothesis, let me tell you what that was. Intake quota hypothesis is plaintiff's theory of complete compensation. In other words, if you smoke only for nicotine and you go to a lower-nicotine cigarette, you will smoke more to get enough nicotine, and therefore, you will have an intake quota, no matter what level of tar and nicotine as measured by the FTC exists.

So what he's saying is we have been studying this issue to see if -- if I can get back to the text -- "we do support an intake quota hypothesis based on tar and nicotine."

That's important, because they weren't, as

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Mr. Wobbrock suggests, just analyzing nicotine. They were analyzing whether or not smokers have a quota for tar. So similarly, if smokers went from a high-tar cigarette to a low-tar cigarette, would they smoke more of the cigarette to get to a tar quota as opposed to a nicotine quota? They were looking at both of those questions.

Excuse me, ladies and gentlemen, this is what they said, this is what Mr. Ryan said:

"If an intake quota could be demonstrated, this fact would go a long way toward answering the question why do people smoke? A question we feel it is our responsibility to answer." Mr. Wobbrock said we figured that out a long time ago, why do we keep asking the question? Why do we think we have a responsibility to answer?

Let's move to the next paragraph, please. "But to date, we can offer no convincing evidence that a simple quota exists. We can't support the idea there is full compensation."

To the contrary, our studies, including Barbro Goodman's nine-person study that Mr. Wobbrock seized and thought to be so elemental -- to the contrary, our study suggests smokers either do not change the number of cigarettes they consume when delivery is lowered, or else they change by truly trivial amounts."

"It appears" -- and this is the next paragraph -- "that when a smoker switches from a full-flavored cigarette, like Marlboro or Winston, to a cigarette in the low-delivery range -- like Merit, which was offered in the

very year that this memo was authorized by Dr. Ryan -- he reduces his daily tar and nicotine intake almost proportionately."

When he says proportionately, what is he talking about? He's talking about the FTC tar and nicotine measures. He's saying they may not be actually 8mgs you get, but in proportion to a Marlboro, that's 16, you are going to get about half as much tar as you get with both cigarettes. Proportionally, you reduce your tar and nicotine intake. This is the kind of internal secret study that counsel will not show you, because it tells you what the true state of knowledge of Philip Morris was.

At the time that this product came on the market, Philip Morris obviously did not have any knowledge of complete compensation. Ladies and gentlemen, it doesn't have knowledge of complete compensation today. You will hear from experts, people who work at Philip Morris today, who are former employees, who will tell you they believe that compensation is partial and that low tar, in fact, still provides benefits, although we're learning more from

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recent studies that the benefit may become

smaller and smaller. But that's what they knew, and that made sense. And they were doing the right thing by offering Merit Cigarettes.

All right. So again, please look at all the documents you see. That document, by the way, ladies and gentlemen, again Defendant's Exhibit 915, September 16, 1976.

All right. Then Mr. Wobbrock says, "Hey, these ventilation holes, that's the design fraud." I have already told you what Dr. Farone is going to say. That doesn't make any sense.

But again, what knowledge did we have that our ventilation holes didn't work? Didn't show you any internal Philip Morris studies, any secret studies there. You know why? Because every one of our studies we did of our ventilation holes showed they basically worked. In fact, you could get some partial -- this is a fancy word -- occlusion, coverage, with your fingers, but it was very partial, and by and large the numbers still were much lower than a high-tar cigarette.

Here's an example, a document, an internal secret study he didn't show. Every single one

at least I have been able to find at Philip Morris, every one of them says ventilation holes are working to reduce tar and nicotine.

This is a 1983 memo from again Dr. Ryan to a McDowell. Let's just turn -- this is a study -- I won't read all the -- lead up to it, because the hour is moving along, but it's talking about trying to examine the effect of covering the ventilation holes in a cigarette. And what he says under the results, first paragraph, if you would, please, first, he says -- you know, actually, what they did is they had a video camera, and they watched people smoke at cafeterias and things like that, and they would watch how they would smoke, and would they put their fingers up and actually be covering the holes when they smoked. So it was sort of like candid camera. They were watching them smoke. And they were recording every time they might cover. And what he says here is, "forty percent of all recorded puffs were reported to be subject to at least some incidental finger occlusion of dilution holes, covering of the holes. The incident of coverage does not seem related to

the delivery of the cigarette."

So he says two things: We did see some coverage, but also, remember, when you look at someone smoke a cigarette -- and I haven't done this before until I read this memo -- look at whether or not they are actually holding their

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fingers up to their mouth when they smoke. Do they take their fingers away when they smoke and put it away? Do your own test as you look at friends and family on that question. What they found was that only forty percent of the time --

MR. TAUMAN: Your Honor, counsel has invited the jury to did an outside.

MR. WOBBROCK: I'll --

MR. TAUMAN: Wait a minute. Counsel has invited the jury to do an outside inspection, which is clearly against Your Honor's instructions.

MR. PHILLIPS: I withdraw that, Your Honor. I apologize.

THE COURT: Very well. Disregard it. Proceed, please.

MR. PHILLIPS: Let's look at the results. We don't have to do our own study. If you

could turn to "As can be seen."

"As can be seen, the effects of coverage are trivial and would in all likelihood suggest no change in the reported FTC tar numbers, which are given in whole numbers rather than decimals." This is our internal study. There is no reason for us to be kidding ourselves. We are doing this examination ourselves, and this is what we're finding.

If you could turn up to five in the chart. You can see this is not an abstract study that doesn't relate to the product in issue because you saw a lot of documents and arguments about Philip Morris generally and tobacco industry generally, but you didn't see a lot from Mr. Wobbrock about Merit Cigarettes.

This is a study of Merit Cigarettes, and it showed, because the FTC method is a rounding method, that in fact the same numbers would be reported. The effect on delivery was not significant. That's what Philip Morris' internal studies showed.

So when you hear testimony this is a defective design, remember these two things: One, the public health community and the

government both were aware of the designs and endorsed them through the Tobacco Working Group; and two, our own studies said they were effective, they worked. And compensation was partial. Low tar had some benefit, which is exactly what the public health community was saying over and over again to people like Michelle Schwarz.

Now, there has been some recent analysis which suggests that maybe the benefits are not as great as were thought for the last 35 years. Some people -- in fact, experts who are going to appear for the defendant -- the plaintiff in this case, excuse me -- are going to come here and say, you know, we gave the wrong advice.

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We gave the wrong advice. We think low tar -- there is not enough evidence to really support that low tar is better.

Now, ladies and gentlemen, they have every right to make that conclusion. They are people who are concerned about public health, and they should be changing their mind. It won't be the first time that public health officials have changed their mind.

At first we heard that butter was bad.

Then after people switched to margarine, we heard margarine was bad. Then we went back to butter. And there are many, many examples of that. But if they want to change their mind, that's fine. Philip Morris has to take account of their recommendations, because Philip Morris wants to work with the public health officials. Philip Morris does not believe that the public health officials are saying don't produce low-tar cigarettes. Philip Morris does not believe the public health officials are saying stop using ventilation holes. We haven't heard that recommendation. But if we hear it, we're going to listen, and we're going to try to figure out how to design a cigarette that is truly less hazardous. We have to adapt to what the science is and what the public health officials are saying. And if they really think today -- and there is hardly a consensus on this point on -- that really the benefits are too small to be touting low tar, then we need to find a way to make a less hazardous cigarette.

What they can't do in this trial, ladies and gentlemen, what they cannot do is say what

we did from 1976 forward with Merit was a fraud. They can't do that, because they were telling us exactly what we should be doing. We were doing it with their full knowledge, and they were supporting and telling people like Michelle Schwarz this was the thing to do if you are not going to quit. You can't rewrite history. You can't -- whether you like a tobacco company or not, you can't rewrite history, and this is the history of Merit Cigarettes and the recommendations of the public health officials for the last -- here's what the Surgeon General said in 1981.

First, just like that Tobacco Working Group report, they acknowledged Philip Morris' design techniques and other tobacco company's design techniques to reduce tar: Filters, ventilation and so forth.

They concluded -- and again, there was no secret regarding the possibility that smokers could change how they smoked. They said that compensation by increasing the number of cigarettes, the depth of inhalation or volume or frequency of the puffs, which would reduce

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the benefits of tar. So they were aware of the

phenomenon, and they were aware they could reduce the benefits. Even so, the report concluded that the Public Health Service policy is that for those who continue to smoke, some risk reduction may result from a switch to lower tar and nicotine cigarettes provided no compensatory changes in style of smoking occur.

So they conclude that compensatory changes can close the gap of benefit, but they were continuing their recommendation to the American public. Plaintiff's experts will admit they were telling smokers to switch to low tar at the time of Michelle Schwarz and during the entire time that she smoked them.

All right. I want to turn to a different subject, which is another way to try to make a less hazardous cigarette. What we have been talking about is a way to generally reduce tar, filters, ventilation, less tobacco for burning. These are ways that you can generally reduce the tar in smoke.

Another way you can, it is called specific reduction, finding the chemicals of concern and trying to remove them. That's much, much harder, because burning tobacco is a dynamic

process, and many of the chemicals that are created in burning tobacco are created from burning. You find the same kinds of chemicals, for example, in a campfire, because it's burning. It's the burning which causes the creation of these kinds of chemicals, so you are trying to control the creation of certain chemicals in a highly dynamic process. It is not easy to do. And as Mr. Dumas said, there are over 4,000 such chemicals in tobacco smoke.

Now, I want to start though by again at least taking a moment to ask you to have the patience to look at the documents, the snippets that Mr. Wobbrock showed you, carefully. This document he showed you, a 1961 document -- I didn't -- well, the document is Exhibit -- I'm sorry, ladies and gentlemen. I don't think I took the exhibit -- I did. I'm sorry. Let me give you the cover, so you recall what it is.

This is Plaintiff's Exhibit 38. It was a 1961 memo from Helmut Wakeham called Tobacco and Health, R&D approach. And Mr. Wobbrock showed you this document. He showed it to you because -- can we blow this up a little bit, please? He showed it to you because he was

showing that Philip Morris inside in their secret documents knew about chemicals in tobacco smoke that were carcinogenic, that could cause cancer.

Well, I need to tell you two things here. One is this document in 1961 was, in essence,

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the blueprints for Philip Morris' attempt to begin in earnest to truly make a less hazardous cigarette, not just with lowering tar, but to find chemicals of concern and to remove them. And when you see this document in the jury room and when it's talked about at trial, remember it's an entire document and you should read it, because it actually tells you just what Philip Morris was trying to do to make a less hazardous cigarette because of its obligations to its customers, because it was the right thing to do.

If I have been blocking it, I apologize. Mr. Wobbrock said -- he showed -- you can see it, talking about the chemistry of cigarette smoke, and he showed you all those chemicals. What he didn't tell you is that list that he showed you was provided by Philip Morris to the Surgeon General's Committee in 1963 as part of

its work for the Surgeon General's report in 1964.

He shows you a document that's supposed to be hidden, that's supposed to be secret, and he doesn't tell you that those -- that list, that very list, was given to the government as part of the Surgeon General's report.

He showed you Exhibit -- he showed you Exhibit -- I'm sorry, ladies and gentlemen. I'm just going to mention this in the interests of time.

He showed you Exhibit 53. You may have marked that in your notes. And he showed you there was a discussion of polynuclear hydrocarbons and nitrosamines.

Let me read the sentence on page 2, which he didn't read to you. "We now have an active program seeking to reduce or eliminate these substances from smoke." They were trying to get the bad actors in smoke out.

Now, the problem with the bad actors, ladies and gentlemen, is that the list of them may change over time. Phenols, it turns out have not -- they are a concern. There is concern regarding their contributing to

disease. And the Merit Cigarettes that she smoked, ninety percent of the phenols had been removed through filtration, ninety percent. There is not going to be any testimony in this case that Philip Morris didn't have advanced designs on its filters to reduce phenols. It did.

Nitrosamines, nitrosamines, particularly in the last couple years, have become a real focus of the public health community about what may be in tobacco smoke that causes injury. Philip Morris has reduced ninety percent of the nitrosamines in the cigarettes that Michelle Schwarz smoked. It's doing more. In recent years, it's actually funded a program with

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farmers -- because farmers are the ones who grow the tobacco and cure the tobacco. It was discovered that one of the sources of nitrosamines was the gas heaters that farmers used to cure their tobacco in the barn. The gas heaters would filter up certain chemicals and cause the creation of nitrosamines.

Philip Morris spent $35 million in the last few years eliminating gas heaters and funding the farmers' changeover to not using

gas heaters but, I think, electric heaters to heat. So there are things that Philip Morris is doing every day to reduce nitrosamines, and they were doing it with respect to the Merit Cigarettes she smoked.

PAH's, that is poly aromatic hydrocarbons. We'll call them PAH's. Those have been hard to reduce. In fact, from the perspective of the public health community, they really -- they really have not focused on that much. In the 60s, PAH's were the big concern. PAH's were the chief concern. But it's really moved more to nitrosamines in recent years and some more chemicals you will hear about.

So PAH's appear to be less of a focus from the public health perspective. They are very hard to reduce. One of the problems is when you take something out, you have the effect of adding something in. PAH's, if you reduce, you sometimes have the tendency to increase nitrosamines and vice versa. So PAH has been very hard to reduce. But Philip Morris' efforts -- and you will hear about billions, billions of dollars that have been spent in trying to reduce these chemicals in tobacco

smoke and to reduce them in Merit Cigarettes. Specific reduction is very hard.

It's really only a qualified success. I'm not going to suggest to you it has been a great success. But there has been very significant advances responding to the public health community to try to reduce some of the bad chemicals in smoke.

Now, Mr. Wobbrock says now, well, Okay. But you said to Michelle Schwarz that Merit Cigarettes are safer. Well, I don't know if you had the same impression I did, but he didn't show you that Merit advertisement for very long. I remember him showing you a True advertisement, which is not a product she ever smoked. It's not made by my client, but it's a nice sound byte for him, because he wanted to plant an impression that this ad said the same thing.

That True ad said, "If I don't quit, I'm going to switch to True." I think it says something like that.

Merit ads don't say that, and they have never said that. Merit ads say, "Merit,

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solving smoker dilemma." Then he pulled the advertisement off, so you didn't know what the dilemma was.

Well, what was the dilemma? "Enriched flavor breakthrough ends search for low-tar, good-taste cigarette." If you could blow up the last couple sentences of the text of this copy, this is a 1976 ad, ladies and gentlemen. "For years smokers had to choose between real tobacco flavor or low tar until Merit." That was the dilemma. The dilemma was if you wanted to go to lower tar, you had to sacrifice taste, and Merit truly was a breakthrough in this respect, because Merit -- they patented a technique for extracting the flavor components of higher-tar cigarettes, just the flavor components, but actually taking the components of flavor out of the smoke of high-tar cigarettes and creating a means of increasing the taste flavor in a low-tar cigarette. It was patented. It was tremendously successful, and everything about this ad was truthful.

What did the ads say? They said three things: They are low tar, and they are low tar according to the only method by which low can be measured, the FTC method.

They are good tasting, and that was really the source of most of their copy, because they did a lot of consumer tests, and it really showed that people like Merits as much as a 12 or 13mg tar cigarette.

And they said another thing: These things can kill you. Mr. Dumas made that point very clearly, and every ad obviously said that as well.

So where do we come with all this review? It also has been said, you know, less is better. So I'm not going to try to argue, because I don't know and we have never had a chance to talk to Michelle Schwarz about what her motivations were, but it's certainly understandable that she may have thought that. But certainly the evidence is that no reasonable person and certainly not Michelle Schwarz would have thought these are safe. They could still kill her. And if she got information, it was not from Philip Morris these were less hazardous. It was from the public health authorities. And who would you trust more but the public health authorities on such an issue?

Philip Morris' ads did nothing more than what really was part of what the recommendation was from the public health community: Make a low-tar cigarette. They did using the techniques that everyone agreed was the way to do it, and tell people about it so they can

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make the choice to switch. And that's what these ads did.

So let's get back to Michelle Schwarz. All right? That's what this case is about.

Every pack she smoked had this warning on it. And you have seen the other warnings from other periods of time. But every pack of Merits had this warning that she ever smoked. She probably saw some Merit ads. It's hard to imagine she didn't. But we were able to gather very little evidence in this case that she either paid attention to them or cared about what Merit ads say.

Every single one you will see in this case is very similar to the one I just showed you. She may have thought they were less hazardous, but you can see why, based on what the public health authorities were telling her.

And the information that she had was in

the magazines that she was reading. Meanwhile, until you succeed in quitting -- this is Good Housekeeping, 1977 -- "If you haven't already to a low tar -- until you succeed in quitting, switch now, if you haven't already, to a low-tar, low-nicotine brand of cigarettes." That's what Good Housekeeping was saying based upon what the public health authorities were saying. I won't read all of it just in the interests of time.

Again, Good Housekeeping, 1978, "Low tar, low-nicotine cigarettes are safer, but they still cause lung cancer and contribute to heart disease. Your best bet remains not to smoke at all."

There wasn't a single message that came out that didn't make it clear low tar could kill you. They were just less hazardous from the perspective of the public health community. these are the messages she was getting.

And again, "Regarding women, lung cancer now the number two cancer killer of women. Health experts are emphasizing that women smokers should quit, cut down or at the very least smoke low tar experts -- cigarettes,

excuse me. Recent data indicates smoking low-tar cigarettes slightly reduces -- and that's what the evidence was -- slightly reduces the risk of getting lung cancer."

And we also know that she had information regarding compensation. You know, we have been talking about compensation, which is probably a term that's new to you. And we know that the FTC knew about it. We know that the government knew about it. We know that the public health authorities know about it. Maybe there is something intuitive about it. You are a smoker and you inhale more deeply or you smoke more cigarettes, you probably have some idea that you are probably not using the cigarette in the

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way that it's intended in order to reduce tar and nicotine, but there were also lots of statements in the press regarding the risk of compensation defeating low tar.

This is in the Oregon Statesman. That's what it was called before it was called The Statesman Journal, the Salem paper. And in December of '76, that's again the very year that Michelle Schwarz started smoking Merit Cigarettes. It said -- I'm just going to read

the red part. You are welcome to read the whole part.

"It's generally believed the less a person smokes and the less tar he gets, the smaller his risk. Unfortunately, some studies have shown people tend to smoke more cigarettes when they are smoking the low-tar, low-nicotine variety, so there is no overall health benefit."

Now, again, Michelle didn't -- plaintiff's witnesses will admit that she didn't increase her smoking, number of cigarettes. And the data we have indicate that, in fact, smokers don't. When you to go a low-tar cigarette, most people don't increase the number of cigarettes.

Consumer Reports, we talked about that was one that Dr. Schwarz subscribed to. Again 1976, May of 1976, less tar, less nicotine, is that good? It's a long article. I won't read it to you, but these are the points you will get from it when you read it in evidence:

Nicotine is a an addictive agent -- hardly a surprise.

Smokers can change the way they smoke, low

tar and nicotine cigarettes to shorter butts, more puffs, inhale more deeply.

Smokers are not machines and can defeat low delivery by how they smoke. That's what that Consumer Reports article said.

So we have no evidence that she actually got less tar -- let me strike that and start again.

We have no evidence in this case that Michelle Schwarz actually compensated fully in smoking these cigarettes. We don't know for sure. We have no evidence that she did. We know that the techniques were the techniques that were approved and acknowledged as the way to try to achieve lower level. We know she didn't smoke more. All the evidence is she actually smoked less, based on her doctor's recommendation.

And there is no evidence, ladies and gentlemen, none whatsoever, that if Philip Morris had not come up with Merit Cigarettes that she would have quit -- none. There is no evidence of that at all.

And there is also -- it's important to

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recognize that if she switched to Merits

because she thought they were less hazardous, we know this, just by what she did. She didn't switch to Merits solely for health reasons, because we know that there were lower-delivery cigarettes on the market. In 1976, there were lower-delivery cigarettes on the market. These are the Merit lines that came on later, but Carlton and other brands existed in 1976 that were much lower than Merits. Merits are an 8.2 milligram cigarette. I took 1992 as a bench mark.

Merit Ultra Lights, which were offered beginning, I think, in 1981 are 4mgs, and Merit Ultimas are 1.3 milligrams. She never went to those brands, if in fact she was trying to smoke only the most or least hazardous cigarette.

So taste and the style of cigarette she wanted mattered to her, although health concerns may have been one of the animating factors because of all the information I just described to you.

All right. I want to turn to nicotine. It's a new subject, but Mr. Wobbrock spent some time on it, and we need to talk about it.

As Mr. Dumas said, nicotine is something that's in tobacco. Okay. It's not something that's added to tobacco. And nicotine through the manufacturing process is actually taken out of tobacco. So the rod has much less nicotine in it than what you find in a natural or rolled tobacco cigarette.

Over the years, the same techniques that were used to reduce tar also reduced nicotine. So this chart and these techniques also resulted in significant reductions in nicotine from 2.7mgs -- this is again sales-weighted average; it's just the average of that particular year -- down to less than .9.

And remember, with the Merits, you are going down considerably lower, .64 is below that average; Merit Ultra Lights .46; Merit Ultimas, .15 milligrams.

Now, I'm not sure if I understood Mr. Wobbrock' presentation to you regarding nicotine. He seemed to say that you should take nicotine out of the cigarette because nicotine is addictive. But in the same breath, he said, "Of course, Michelle Schwarz would never have wanted to smoke that cigarette,

because she smoked for nicotine." And that is in essence the problem with the no-nicotine cigarette.

This is a technique that has been achieved. You can take all the nicotine out of a cigarette. In fact, Philip Morris did that

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in the mid 80's, and it test marketed a denic'd cigarette with the Merit and the X brand. It test marketed in a number of test markets around the country. Spokane was the closest test market for this.

Mr. Wobbrock said they didn't try to market this. You just roll it out with lots and lots of money to see what happens. Well, that's not how you market a product. You have to test it to see whether it's consumer acceptable. If it is, you then come out with a full roll out. This was a completely new idea.

Philip Morris spent -- by the way, the '64 Surgeon General's report said it appears that a deniconized cigarette actually is not consumer acceptable. They acknowledged that in '64. But this technique Philip Morris used was much more sophisticated because the company of Philip Morris purchased a company called

General Foods, and General Foods had a decaffeinated coffee called Sanka. It was a German company. And Philip Morris employees went over and learned this technique, supercritical extraction process. Let's not talk about it this time in the afternoon. But it was a process by which they took caffein out of coffee was essentially emulated with respect to the creation of a deniconized cigarette. Philip Morris spent $300 million building a plant for rolling this product out, and they test marketed it for sometime. They took it off the test market when it wasn't acceptable to consumers. They went back into the laboratory to try to make it consumer acceptable. By 1992, they gave up.

When Mr. Wobbrock -- again, I'm not sure I fully understand his argument here, but when he says we didn't offer a deniconized cigarette, merit is almost a deniconized cigarette. It's .15mgs of nicotine. Remember, he said they carefully calibrated just where it was they needed the nicotine, and he gave you numbers. All these numbers are below those numbers, by the way.

Why are we offering these products, if in fact it's below what he says we figured out was the level we needed to keep people addicted?

Don't get me wrong. Nicotine is an important part of the smoking experience. Philip Morris has learned that over time. It's learned for the time being that you can't take all the nicotine out and still make it a consumer-acceptable product. It's learned that it offers some, but you have to have consumers who want it. Merit Ultima has a very tiny fraction of the market. Not many people want to smoke it. You can't change how consumers react to your products.

And so they have done things in terms of

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removing nicotine altogether. They have taken an extraordinary amount out. Michelle Schwarz picked the brand she wanted.

And this is really key, ladies and gentlemen, because when you talk about a less hazardous cigarette -- and this is Ernst Wynder. You will remember that name because Mr. Wobbrock mentioned it to you the Wynder & Graham mouse painting studies. He called him Winder, but I think his name is Wynder. Wynder

& Graham mouse painting studies in 1953, this is the same gentleman, caner researcher.

Again in 1980, he was making a point which is still valid today. As a practical matter, it is important to appreciate this a virtually harmless cigarette -- let's assume -- obviously, it's not true. But let's assume a totally nicotine-less cigarette were harmless -- was smoked by one percent of the population, it will have a lesser impact on the reduction of tobacco-related diseases than a somewhat more harmful cigarette smoked by 80 percent of the total smoking population. You have to have something -- I'm going to skip down because of the hour.

You have to have sufficient acceptability for the largest segment of the market. A deniconized cigarette obviously does not sell, although Philip Morris has continued to work on it. They have a full range of products. Merit is in that range, though it's hardly the lowest.

The next thing that Mr. Wobbrock picks on is the idea of manipulating nicotine through ammonia. Let me say something about ammonia.

You are going to hear from a Dr. Burnley, Dr. Harold Burnley, who is a head of operations at Philip Morris. And he has been there a long time, and he has been involved in the operations of how to make cigarettes and manufacture them and so forth. I think you will like him.

He will tell you that ammonia is used -- first of all, ammonia is naturally occurring in tobacco. Just like nicotine is naturally occurring in tobacco, ammonia is naturally occurring in tobacco. And ammonia was used as a processing agent, because when you manufacture tobacco, it's not like, you know, pulling the leaves off and sitting on the back porch and rolling. It's a manufactured process. And they try to use all of the plant. And they grind it up. And there are pieces that fall out. And those pieces they want to use as a matter of efficiency, and they try to put them back together again.

How they put them back together again, you have heard the term reconstituted sheet or there is also a BL type of sheet that you will

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hear about. They have to have something to

hold it together. And they used ammonia to hold it together in part because ammonia is already in tobacco, so you are not adding anything to it that isn't already there, is a substance foreign to tobacco. And that's how it was used.

Now, over time they discovered -- so it's a manufacturing process. It's not there. He will tell you they will never put ammonia in the manufacturing process to increase the delivery of nicotine, to increase free nicotine. They never did that. You will have to evaluate his testimony and the allegations of Mr. Wobbrock.

But what he will tell you is that ammonia, like nicotine, does impart flavor, and smokers tend to like the flavor of ammonia -- that's added by ammonia. It gives it a richer, fuller flavor. And so there are products that continue to have ammonia in them because they add flavor to the smoking process.

Now, Mr. Wobbrock says, well, you know, -- this is -- this summarizes what we just talked about. This is how ammonia is used in the process. Ammonia compounds are chosen because

they occur naturally in tobacco.

Mr. Wobbrock says, well, you know, that ends up increasing the pH of cigarette smoke so that more nicotine is free or freebased. He used the "freebased" term.

Well, you are going to hear testimony in this case there is absolutely no evidence that's true. In particular, there is no evidence that's true as to Merit Cigarettes. This, after all, is a product. You are not going to hear any evidence from the plaintiff that they took this product and they tested it to figure out whether their theories actually were true.

What they really want to do in this case is to take documents here and there and to paint a picture and then suggest that it may be true with respect to Merit Cigarettes.

These can be purchased down the street. No one is keeping them from getting it and looking at it, dissecting it and figuring out whether their other theories are true. They haven't done it, because they know we have tested them and there is no evidence that ammonia contributes to free basing nicotine at

all -- none in the Merit cigarette.

Ammonia adds quality and flavor. In other words, smokers may like their smoke more because of the ammonia in it, but that's not spiking cigarettes with nicotine. It's not causing more free nicotine to go to the brain

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and so forth.

The most important point to realize here is that when nicotine goes into the system, it actually goes in at the lung, where the lung/blood membrane is. And the blood has a constant pH, the acidic or basic quality of that substance, that pH is right about in the middle, 7.4. And everything that goes into that bloodstream is immediately transformed to 7.4 absolutely. The body accommodates any new substance to that pH. As a result, all the nicotine that goes to the brain is always in that ratio. 80 percent found; 20 percent free nicotine. That's the science behind that allegation, and plaintiff will have no response to that.

Again, I have to turn to documents, because he showed you them. He showed you only portions of them. He showed you a document in

1994 that suggested that if you add -- if you can, go to the second paragraph. Yeah, those two paragraphs. That's great. Thank you.

He showed you this portion that I bracketed to illustrate a study that was conducted -- I'm looking right down there, yeah. A study was conducted on nicotine aerosols. It's very hard to read, isn't it? It was found higher peak concentrations of nicotine in blood achieved a higher pH. That's what he showed you. What he didn't show you was the first sentence. Go to the first sentence if you could, please.

"The argument that bases are added to increase the nicotine delivery above normal levels is entirely specious." That word means wrong. The same amount of nicotine is delivered whether the smoke is acidic, basic or neutral.

Further down -- I'll just read it to you. It is clear from the data that filter pH, the pH of the filter of a cigarette, has no effect on nicotine delivery. That was the study he cited to you as showing you a smoking gun. Again, nothing, no evidence on Merits at all.

This is a product defect case. Why aren't they going and testing the product, itself, to prove their claim? Because that would show the truth. They would rather show documents and create inferences and have you conclude that there is something wrong when they haven't even bothered to test it.

Let's turn to ingredients for a second. Again, he threw that accusation out, ingredients. Excuse me, ladies and gentlemen. Well, here's the story behind ingredients. The Merit cigarette does have ingredients. It has flavors, sugars and so forth that are added for flavor. Sugars are again natural in tobacco. They tend to be lost in the manufacturing

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process. So one of the things you do as a manufacturer is to add sugar back in to retain the flavor of natural tobacco.

All of their ingredients have been disclosed to the government, the federal government, and the federal government has never requested removal of any ingredients in Philip Morris cigarettes.

Philip Morris has tested its ingredients, by the way. It has tested them as smoked.

Mr. Wobbrock said, "Hey, all they say is that these ingredients are fine for eating, but that's not smoking or inhaling.

Well, we tested them as inhaled substances, and there is no indication that those ingredients increase the hazardous nature of cigarette smoke. That's an important point.

The point is that the hazards of cigarette smoke are in the burning tobacco -- ingredients don't matter. They don't increase the hazards. They don't decrease the hazards. They are a very small component of the tobacco and no public health agency says, none, that cigarettes without additives -- and there are some products that advertise no additives. That's not this product. But no public health official says that a product without additives is safer than one with additives.

All right. The bottom line is that cigarettes are dangerous. Nothing that Philip Morris did to Merits makes them more dangerous. A number of things that they did, they have the fervent hope have reduced harm. But you can be sure that they were done with the purpose of reducing harm.

You are going to hear from Dr. Jerry Whidby in this case. Dr. Whidby is recently retired from Philip Morris, grew up in Georgia. He is a life-long -- was a life-long employee, a research scientist at Philip Morris. Again, I think you'll like him.

He will tell you -- and this is important, because of the fraud allegation. He was a smoker in 1976. He was working on Merits and the roll out of Merits. This was before 1976, 1975.

He will tell you that he switched to Merits and that a number of other Research and Development scientists lined up to try this new product, because it was a lower-delivery product with good taste.

Hold that image in your minds when you consider the fraud allegations in this case.

All right. Mr. Wobbrock said I'm going to talk to you about new products, and I am, because the way to try to make a less hazardous product is not easy, but I want to talk to you about what Philip Morris is doing today.

Philip Morris has 600 people in its

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Research & Development Department. It is doing

more than any company in the world to reduce harm in cigarettes -- any company. There are companies that are owned by the government, France, Japan. They are not doing as much as Philip Morris to reduce harm in their cigarettes.

Philip Morris wants to reduce harm in its cigarettes, and this is one product that you are going to find surprising, which Mr. Wobbrock said is really an indication that we aren't really trying, because no one has ever seen this before. Well, that's true; you haven't seen this before. This is a product called accord. It looks like a cell phone. It's a non-burning tobacco. There are -- and I'm going to show you a chart so you can see as I talk about it.

There are various infrared sensors and blades that heat up in this product, which allows the cigarette smoker to smoke without any side stream smoke. There is a battery. That's why you have to charge it, any side stream smoke. These are the things that are achieved by Accord. It heats the tobacco at a controlled temperature.

Remember, I said it's the burning which creates the problems and chemicals. Well, we're trying to eliminate the burning so that fewer chemicals are created.

Now, Mr. Wobbrock says, you know, you really haven't pushed this product. Well, think about trying to roll this out mass market. Who would buy it right away? This is not something you would imagine Humphrey Bogart smoking in a movie. It's hard to imagine. This is not the kind of thing that consumers are going to immediately accept. It takes time, and it takes effort to change consumer perceptions.

This is a product that Philip Morris is actively working on and has been for the last two-and-a-half or three years. But you just can't say, "All right. I'm going to put ten billion of them on the market and see what happens." It has been test marketed in Japan with limited success. It's being test marketed in Richmond with some success, but they need to make this smaller. They need to make it more consumer acceptable, and that's going to be a challenge for them. Why is it worth doing

that? Why are they spending their time making a cigarette that doesn't look like the traditional cigarette? Because the numbers are incredibly encouraging.

Let me show you the numbers. We talked about specific substances, and I won't go

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through all of them, but you can see that very important substances that are deemed dangerous in cigarette smoke are reduced by orders of magnitude over conventional cigarettes. Ninety-six percent reduction in benzo(a)pyrene. Nonvolatile nitrosamines, 92 to 86 percent reduction; volatile nitrosamines, 93 to 99 percent reduction. We're working on a product that people will enjoy the smoke, the taste. There will be no side-stream smoke so people will be annoyed. And it will have a very good chance of reducing the risk.

Hundreds of dollars have been spent on this. When you look at it, you say why would people smoke that? But people may be doing that in the years to come.

Let me talk about the SCoR Project. You will also hear about that. That's the conventional product. That's the distinction

between an unconventional product like De-nic and this, where you have to develop consumer acceptance and a conventional product.

You will hear from Dr. Burnley about the SCoR Project. They are doing complete human exposure studies on this project. In other words, if compensation is a issue, they will find out about it, because they are doing complete human exposure studies. And again, the test results are very encouraging in terms of reducing the amount of harm.

This is not an easy thing for Philip Morris to do, because it's inherently dangerous to smoke. But they are working as hard and they are in front of any technology in the world in trying to get there.

All right, I'm going to change the subject. We're at 4:30, and I think I can be done by 5:00, Your Honor.

THE COURT: Very well, counsel.

MR. PHILLIPS: I want to turn to The Frank Statement to cigarette Smokers. I want to turn to it, because Mr. Wobbrock talked about it so much.

And first, I want to say it was issued one

day in 1954 by the tobacco industry, and Michelle Schwarz was eight, and she never saw it. Dr. Schwarz never saw it. It really has very little to do with this case, but let's talk about what it said and what Philip Morris did and how it met its obligations under The Frank Statement.

Let's just go through it, because I want you to understand what they were saying, and I want you to understand what they intended to do. You can blow that up.

It says, "Recent reports on experiments with mice have given wide publicity to the theory that cigarette smoking is in some way linked with lung cancer in human beings." That

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was the news. That was the important news they were reacting to.

Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the fields of cancer research. However, we do not believe that any serious medical research, even though its results are inconclusive, should be disregarded or lightly dismissed.

They are crediting these scientists with

doing good work. They are saying inconclusive, and they are absolutely true at the time.

"At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and real search scientists have publicly questioned the claimed significance of these experiments.

David, if you could go down, please.

That also was quite true at the time. And then he points out what those distinguished authorities have pointed out. This is the portion that I think Mr. Wobbrock read to you. He pointed out number 3, that there is no proof that cigarette smoking is one of the Causes. That did reflect the State of knowledge at the time. There is nothing false about that.

If we can go down to the next one just in the interests of time. I won't read all of it. I don't mean to be skipping over it. I know you have seen a lot today.

It said -- we accept an interest in peoples health as a basic responsibility paramount to every other consideration in our business.

And what I have just gone through with you

in terms of all the efforts, the billions of dollars that have been spent to try to reduce harm is that commitment, ladies and gentlemen.

We believe the products we make are non-injurious to health -- they did believe that at the time. We always have and always will cooperate closely with those whose task it is to safeguard the public health.

Well, you know that has been more and up and down story, highly political. They worked very well with the government during the Tobacco Working Group Years.

Then Joseph Calafano, the Secretary of Health, Education and Welfare, declared war on tobacco in 1978 to stamp it out and cooperation was a little rockier for awhile. But Philip Morris is doing everything it can to work with the public health community to try to make a better, a less addictive cigarette.

Let's go to the next paragraph, if we can. This is what they said they will do. "Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here's our answer: We are pledging aid and assistance to the research efforts into all phases of tobacco use and health. This joint

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financial aid will, of course, be in addition to what is already being contributed by individual companies" -- true statement, ladies and gentlemen.

"For this purpose, we are establishing a joint industry group consisting initially of the undersigned. This group will be known as the Tobacco Industry Research Committee.

The truth is this committee did have two functions in the beginning. It had a scientific function and a public relations function. That was probably a mistake. They split it out so CTR was solely a scientific function.

In charge of the research activities of the committee will be a scientist of unimpeachable integrity and national repute. He was the president of the University of Maine. In addition, there will be an advisory board of scientists difficulties interested in the cigarette industry, a group of distinguished men" -- that tells you about when this was written, doesn't it? "Of distinguished men from medicine, science and education will be invited to serve on the board. These scientists will advise the committee on its research activities. This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it." They were going to fund research.

Now, Mr. Wobbrock said it was a front, a shield, a fraud, and he showed you documents that suggested that as well.

Let me just talk about CTR, because he couldn't have been more wrong. CTR provided over $284 million into fund research from 1954. It funded 1,395 scientific research projects. It funded research at 190 independent scientists at over 300 research institutions. Three of its grantees won the Nobel Prize, ladies and gentlemen. And there were over 6300 scientific publications of CTR grant teams.

When you listen to Mr. Wobbrock, it sounds like CTR was its own research laboratory. It wasn't. It funded independent scientists. It funded independent scientists in Portland. Oregon Health Sciences right here; Portland State, Oregon Regional Primate Research Center.

What was it he said about no biological research? Corvallis, Oregon State University. 2.4 million in funding. Ten researchers funded. thirty-three papers published.

Let me talk about the biological research issue for you a second. You heard him say they agreed not to do biological research. Wrong again. CTR funded all kinds of biological research.

What you need to understand was in 1953, when they got together to have this meeting to create what was called the TIRC, the tobacco companies had been held in the late -- early teens in violation of the federal antitrust laws for conspiring together on price. They couldn't just get together and figure they weren't going

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to be in trouble with the government. What -- this meeting was not secretive in the least. They actually wrote a letter to the Justice Department saying, hey, we're going to get together; we're going to fund research, but it's not going to be for competitive purposes. We're not going to be able to do our research together for competitive purposes. That's why it's going to be completely independent of us, fully documented, fully disclosed to the government. It was in The New York Times the day they met. There was no secret about this.

What they funded was an independent organization that could fund other scientists around the country. Mr. Wobbrock says, "Well, you know, they did sort of useless science. They did orange juice after smoking or something like that."

Well, there were lots and lots of studies. Maybe one or two of them were ridiculous. I don't know. But consider these, anyway, as being significant studies.

It was a CTR-funded study that demonstrated the relationship between smoke and lung cancer. It was at least one of the major ones.

It was a CTR study in 1963 is that concluded that heavy smokers are true addicts. How's that for keeping a secret?

It was a CTR study, as Mr. Dumas stated, that concluded that smoking while pregnant reduces birth weight, which lead to the Surgeon General's warning.

It was a CTR study that demonstrated the relationship between smoking and lung cancer in women, because the '64 Surgeon General's report literally said "in men", because there wasn't enough data yet on women. And a few years later while they knew the trend was in that direction, they included women as well.

It wasn't just the CT -- this document -- I want to show you. This is a book. I took this out of the University of Oregon Medical School library. It's called Tobacco Experimental and Clinical Studies. Larsen, Haag & Silvette.

Why do I want to show you that document? Well, again, I have to go back to the documents that Mr. Wobbrock showed you. Remember, he said -- and I'll show this to you -- he showed you a document internal secret 19 -- 1960 -- 1971, I'm sorry. This is a Philip Morris

document. He said it's secret. Look what they said. If we can blow up that first paragraph. "Why does the smoker continue to smoke?" Excuse me, ladies and gentlemen. It goes on and says, for instance, according to Kuschinsky and Hotovy, Larson, Haag & Silvette, "Man smokes not in spite of, but because of nicotine." And it goes on.

Larson, Haag & Silvette, ladies and gentlemen, so much for the secret theory, was a book put together by physicians at the Medical College of Virginia, in which it assembled all of the experimental clinical studies in tobacco science from the previous 50 years. It was published in 1961. It was heavily cited in the Surgeon General's report.

The introduction says, "We gratefully

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acknowledge grant and aid support from the Tobacco Industry Research Committee during the final stages of this project. It was previously funded by the American Tobacco Company. We deem it only proper to inform the reader that all responsibility for the data presented and views expressed hereby either explicitly or implicitly rests entirely upon the authors, not Tobacco Research Committee.

This book has analysis of all kinds of problems associated with tobacco. And it focuses on nicotine and

tobacco as well. The Chapter that Mr. Dumas told you about in the Surgeon General's report in 1964 that concluded that nicotine is habituating, has pharmacological effects, it cited this document as its primary source.

So you have Mr. Wobbrock saying here's a secret document about nicotine being the reason, citing to a book that was published under the funding of CTR or its predecessor organization, and then used by the Surgeon General to conclude that nicotine has pharmacological effects. That's the secrecy he's talking about.

Let me give you another example. I think it's important to at least give you one more example, the need in this case to read documents carefully and to read all of them that you are given.

He showed you a document by Mr. Dunn, Dr. Dunn, a psychologist. And it talked about nicotine as a dose dispenser of nicotine. Do you recall that document? All right. I'm going to walk over to this side so I don't block it. If we can blow up this first paragraph?

He didn't show you the context. This is a memo that Dr. Dunn wrote to his boss after coming back from St. Martins in the Virgin Islands. He stated, "There was a lovely little island lying about 150 miles east of the Virgin Islands. It's at the northern end of the

Antilles, the string of Islands flung out crescent-like across the blue -- he's a very good writer. It would be fun to read this entire memo when you get it in the jury room.

But what he's telling you -- what I would like you to do is turn to the next page -- is that in January of 1972, the Dutch side of St. Martin was invaded by an unlikely party of 25 scientists. It says there were pharmacologists, sociologists, anthropologists and a preponderance of psychologists. They came from everywhere, as you can see. And they came to ask the question: Why do people smoke cigarettes?

And you saw -- you saw Mr. Wobbrock focus on the pharmacological effect of constituents. But all of these features, social acceptance, pleasure, et cetera, were part of the discussion.

Then he goes on on the next page. This was quoted by Mr. Wobbrock. "The St. Martin's conference was called by the Council for Tobacco Research," the same fraud he was suggesting existed before. It was funded by -- it was there in an effort to goad the scientific community into having another go at the problem.

In other words, group of outside scientists coming together to try to figure out why it is that

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people smoke. Is it nicotine? Is it other things? Is

it a combination of those things? What is this mystery?

And then he goes on, and showed you this. We don't need to read. Most thought nicotine was very important to the smoking experience. We agree.

Let's look at the very last page in the interests of time. You can turn to that. "This ends my presentation," he says. "This is the end of my presentation. If you have been intrigued by any of these ideas, I recommend the recently published volume Smoking Behavior Motives and Incentives, a compendium of papers presented at the St. Martin conference published by so and so. So here's a secret document talking about nicotine being a dispenser of drugs and so forth, and he's recommending you read the book at the conference.

I took this one out, too, from the Oregon library, Medical School Library. Here it is. It's edited by William Dunn. It has all of the articles of the conference. They talk about a lot of things that Mr. Wobbrock says is secret, Neurophsycopharmacology of Nicotine and Tobacco Smoking, Further Observation of Nicotine as the Reinforcing Agent of Smoking. And it goes on and on and on, ladies and gentlemen. And I will call to your attention that one of the conferees was Joseph D. Mattarzo, University of Oregon Medical School. You would certainly have seen why he would have wanted to

go to St. Martins in January, 1972.

That's the secrecy that Mr. Wobbrock is trying will to impugn Philip Morris with. All of this stuff was in the public domain.

But let me also say this: There are some documents that he showed I cannot explain. There are some statements that were made by Philip Morris employees that were defensive and wrong, and I'm not going to try to walk around them. I have tried to point out to you that there is so much importance in context and not taking the snippets of counsel, because he has an interest -- Mr. Wobbrock has an interest in trying to show you the very best theory of the case and piecing together what he can. But read everything, because it's important to understand what really happened.

And I want to be candid with you about what really happened with respect to some of these documents, too. There is no question that Philip Morris was a company -- has been a company under attack for 50 years. There is no question that they were worried with respect to FDA regulation and didn't like to have documents that would give the FDA a basis for saying that nicotine could be regulated.

Last year the Supreme Court said the FDA has no regulatory power over cigarettes, but that was debated

between that agency and Philip Morris for many years. And the reason they didn't want to be regulated was because they knew -- this is what the Supreme Court said last year -- is that if it were regulated by the FDA, they would have to ban cigarettes because smoking is dangerous.

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MR. WOBBROCK: Your Honor, I have to object to that. There is going to be no evidence about what the FDA knew, what anybody knew. And it's not proper in this case.

MR. PHILLIPS: I'm just quoting from a case, Your Honor.

THE COURT: All right. We'll let you quote from the case.

MR. PHILLIPS: I'll move on with the subject.

THE COURT: But being in the legal art, just because some Judge or some appellate court said something, sometimes they said the wrong thing. Move on, counsel.

MR. PHILLIPS: This was the Supreme Court.

THE COURT: They are not right because they are the Supreme Court. They are right because they have the last word.

Proceed, please.

MR. PHILLIPS: I have to agree with that, Your Honor.

All right. He showed you some documents regarding -- let me put it this way: There is no question that there are documents that suggested that Philip Morris was slow to agreeing that smoking causes lung cancer. Pack said it, obviously, but in terms of public statements, they were slow in getting there. In 1990 on, they said it was a risk factor for disease. They said statistical associations beforehand, but they were slow in coming to that agreement.

They were slow in not debating definitions regarding addiction. I mean, it gets to be a little complicated, but when that gentleman stood up 1994, Congressman Wyden, he was a good cross-examiner. He knew how to get a sound byte for the evening news, and he knew what he was asking. But the full proceedings, which you will get a chance to see, show why that gentleman was saying cigarette smoking is not addictive. It's because Philip Morris agreed the definition required intoxication, and no one, no expert in this case will say cigarette

smoking causes intoxication.

At this point we are no longer debating that question. Philip Morris is no longer debating that question. They can be criticized for having done that in the past. And they can be criticized and have been and suffered a public humiliation for it.

In my view, this is important for Michelle Schwarz. Mr. Wobbrock didn't show you any study that would have changed what science knew, that Philip Morris suppressed. He didn't show you any study that Philip Morris had or knew about that would have changed what we know about the pharmacological effects of nicotine. He didn't show you any study and he won't be

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able to show you any study that shows that Philip Morris had a better way to make a cigarette and didn't pursue it. They did everything they could to make a better cigarette.

And while they were mincing over definitions and denying what -- strike that -- and focusing on what had not been proven with respect to lung cancer, they were doing everything they could to improve this product

in terms of making it less hazardous on the assumption that it did cause cancer.

And when Mr. Wobbrock showed you documents about burying documents and so forth, well, that's inexcusable behavior by those people. I'm not going to suggest otherwise. But what he doesn't show you -- and there was one memo he showed you by Dr. Dunn saying if Carolyn Levy does this memo and it comes out one way, we should bury it. Remember that?

What he didn't show you was the study, because what's important in his case is to give you the sound byte, not the substance. And the substance is here's the study. It's in Philip Morris' files. It's completely unremarkable. He doesn't care about that. He would rather have you with the image of scientists digging holes in their backyards. It's not Philip Morris. It's not the Philip Morris employees you will see in this trial and people who care about their company and people who care about making less hazardous cigarettes for their products.

All right. I'm going to go to this -- I showed this to you the other day. I want to

show it to you quickly again, because it summarizes the evidence that you are going to see in the case. You know, Mr. Wobbrock said Philip Morris makes this odd argument that Michelle Schwarz was negligent for smoking their products, for not quitting, for choosing to smoke them. Philip Morris' view in this case is that it did the right things and did nothing wrong to Michelle Schwarz by selling a commercial legal product and that she did nothing wrong in choosing to smoke them. It's only because the lawsuit has been brought and claims of negligence have been made that we're forced to say if you are claiming you didn't know, then you are negligent. But our position is that she was perfectly reasonable in what she did, and so were we.

She started smoking as a 18 year old. She knew it was dangerous. You heard the evidence. She was intelligent. And she didn't care or hear or have anything to do with any of the comments or public statements that Mr. Wobbrock has put up to obviously embarrass Philip Morris.

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She did not pay attention, and she wasn't -- to and she wasn't influenced by cigarette advertising. Her husband will say that.

She enjoyed smoking. Let's not forget that. She enjoyed smoking. Her family will tell you that. Her mother will tell you that. And she quit when she was ready to quit. She did take responsibility for her decisions regarding her health.

Philip Morris has responsibility in the manufacture of a dangerous product, ladies and gentlemen. But it has also met those responsibilities. It places warnings on every pack she ever smoked. It measures the tar and nicotine, as the FTC requires. It reports and describes them the way the FTC authorizes. It takes nicotine out. Additives are not harmful in Merit Cigarettes. And it makes cigarettes that consumers like. Maybe that's the objection here. It makes cigarettes that consumers like.

It complies with advertising restrictions, no allegations of violating any of those. And it manufactures and sells a dangerous but an addictive but heavily-regulated product.

Now, Dr. Schwarz really wants you to take the responsibility that Michelle Schwarz took for her own actions and transfer them over to Philip Morris. And the evidence will not support that.

I want to talk a minute about the claims in this case. It's for you in advance to begin thinking about how the evidence fits within the legal cubby holes.

This, ladies and gentlemen -- we can blow it up -- is actually what the Judge read to you on the first day when you came in. I put a little handwriting in there, which is mine, and I'll explain that in a moment. But let me explain to you rather than writing my own versions of the claims, let me give to you what the Judge described.

I'm going to start right here. The estate of Ms. Michelle Schwarz claims that Merit Cigarettes -- remember that, this is a Merit Cigarettes case; that's it, this product, nothing else -- were of defective design and dangerous beyond the reasonable expectations of ordinary consumers.

I submit to you the evidence will show the

reasonable expectation of ordinary consumers is that all cigarettes are extraordinarily dangerous. I put this in here because the Judge will give you an instruction on that, that it's the Merit cigarettes she purchased from February 1990 forward with respect to this

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case, product negligence claims? Have they shown you at the end of this case -- you will have to ask yourself -- that there was a defective design in those cigarettes or Philip Morris was negligent with respect to them substantially causing Michelle Schwarz's illness and death?

You see the substantial factor in Michelle Schwarz's death.

Let's go to the next one. The next one is a fraud claim. They claim that defendant Philip Morris recklessly or intentionally made fraudulent misrepresentations to Mrs. Schwarz and fraudulently concealed information about Merit Cigarettes -- again, it's just Merit Cigarettes. It's not some other product. It's not something that was said in 1952 to someone else. It's Merit cigarettes. That she relied upon -- I'm sorry. Concealed information about

Merit Cigarettes from Michelle Schwarz, that she relied on these alleged misrepresentations and that such fraudulent misrepresentation and concealment was a substantial factor in Mrs. Schwarz' death.

That word, "relied", remember that word. See if you see any evidence in this case that Michelle Schwarz relied on anything, absolutely anything that Philip Morris said or did with respect to Merit Cigarettes.

And on that claim, ladies and gentlemen, they will be required to prove that with clear and convincing evidence. You heard Mr. Wobbrock talk about in jury selection balancing the scales and preponderance of the evidence. This is fraud. This is serious. You don't get to prove a fraud allegation, ladies and gentlemen, without showing with clear and convincing evidence that not only was a wrongful or incorrect statement made, but that it was relied upon materially by the plaintiff in her decision to smoke Merit Cigarettes.

The evidence will show that she didn't and that there is no such evidence.

All right. Punitive damages, I want to touch upon that subject. Mr. Wobbrock spent a lot of time in jury selection asking about a willingness to impose $300 million in punitive damages. That's what he's asking. You don't get to punitive damages unless you have liability, ladies and gentlemen. And if you conclude that Philip Morris' products were not negligently designed or not defective in their design, were not beyond the ordinary expectation -- the reasonable expectation of the ordinary consumer, then -- and if you conclude that she didn't rely upon anything that Philip Morris said or did, then we don't even get to punitive damages.

http://legacy.library.ucsf.edu/id/bjt07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/mpxl0001

I believe the evidence will support that is the simple conclusion you should reach in this case. And if I am wrong, and that you do consider punitive damages after a finding of liability, let me submit to you that this is not a case in which such an award makes sense. This is a product that is legal. It's dangerous. It's heavily taxed. The State of Oregon makes more money on a pack of Merits than does Philip Morris. We have made choices

as a society regarding this product. We are in it, in essence, together. Philip Morris profits from selling it. We have made a decision that consumers can buy it.

Plaintiffs will try a punitive damages case, ladies and gentlemen, without ever really trying a liability case. They are going to try Philip Morris without really caring about its impact on Michelle Schwarz. Michelle Schwarz made her decisions. She lived with them, and you should conclude the same.

Thank you very much.

THE COURT: All right. Thank you, counsel. All right, members of the jury, it's time to stop for today. I want you to be in the jury room tomorrow morning at approximately 8:55, because we're going to try to start as close to nine o'clock as we can.

I am just reminding you in trying to make sure we keep separated from people we are not supposed to be riding up the elevator with, we wants the jury to use this first elevator over here to my left.

JUROR: On the far side, Your Honor?

THE COURT: Closest to you. Counsel and

everyone else, walk down the hallway and use this other elevator.

Please don't discuss the case with anyone. Leave your notes in the jury room. You are excused. Have a good evening.

(Jury out.)

Anything, counsel?

MR. WOBBROCK: Surprisingly enough, Your Honor, I don't think we have anything to ask of the Court at this time.

THE COURT: That is surprising.

MR. WOBBROCK: Thank you, Your Honor.

THE COURT: Court is out of session. nine o'clock in the morning, plaintiff's first witness.

MR. TAUMAN: You bet.

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STATE OF OREGON)
) ss.
County of Multnomah)

I, Estelle T. Keating, Official Court Reporter of the Circuit Court of the State of Oregon, Eleventh Judicial District, certify that I reported in stenotype the foregoing proceedings in the above-entitled case.

I further certify that my stenotype notes were reduced to transcript form by Computer-Aided Transcription under my direction.

And I further certify that pages 1 through 100 contain a full, true, and accurate record of my stenotype notes.

Dated this 6th day of February, 2002, at Portland, Oregon.

_____
Estelle T. Keating
Official Court Reporter

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